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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 10

A. L. DUTTON, WARDEN, APPELLANT

v.

ALEX S. EVANS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (App. 28–38) is reported at 400 F. 2d 826. The opinion of the district court (App. 21–25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1968, and the notice of appeal was filed on September 26, 1968. This Court noted probable jurisdiction on February 24, 1969, 393 U.S. 1076. This Court's jurisdiction rests upon 28 U.S.C. 1254 (2), the court of appeals having held the Georgia statute involved, as applied, invalid under the Sixth and Fourteenth Amendments to the Constitution.

QUESTIONS PRESENTED

1. To what extent may a State extend the traditional doctrine permitting certain out-of-court statements of one co-conspirator to be used at the criminal trial of another consistently with the confrontation requirements of the Sixth Amendment?

2. What constitutional limitations are applicable to hearsay rules applied in State criminal trials?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Sixth and Fourteenth Amendments and the Georgia evidence statute invoved in this case are set out in the Appellant's Brief at p. 3.

STATEMENT

The relevant facts are not in dispute and may be summarily stated.[1] On April 17, 1964, three police officers were found shot to death in Gwinnett County, Georgia. On August 23, 1965, appellee and Eugene Williams were charged with the murder of one of the officers, Jerry Everett. Appellee's motion for severance was granted and he was tried alone on this charge in October 1965. He was found guilty by a jury and sentenced to death.

In July 1965, Williams was incarcerated at the Atlanta penitentiary on unrelated charges. The evidence at the trial showed that when Williams returned to the penitentiary after his arraignment on the murder charge, one Lynwood Shaw, a fellow inmate who had nothing to do with the murders, asked him how he had made out. Williams replied that "if it hadn't been for

[1] A full statement appears in appellant's Brief, pp. 5–10.

that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now" (App. 55). Shaw's testimony about this statement was admitted over defense objection that it was hearsay and also excludable under the Confrontation Clause of the Sixth Amendment. The trial court found that since there had been a *prima facie* showing of conspiracy to commit car theft from which the murder followed, the statement was admissible under the Georgia statute as a declaration of a conspirator "during its continuance, before or concealment after the crime" (App. 54).[2] The Georgia Supreme Court affirmed. Relying on earlier state decisions construing the Georgia statute, it agreed that appellee and Williams, "at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt"; the court concluded that the statement was therefore admissible as having been made "while the conspiracy continued". *Evans* v. *State,* 222 Ga. 392, 402, 150 S.E. 2d 240, 248. This Court denied certiorari, 385 U.S. 953.

Appellee thereafter filed a petition for a writ of habeas corpus in the federal district court, which denied it (App. 4–12; 21–25). The Court of Appeals for the Fifth Circuit reversed. *Evans* v. *Dutton,* 400 F. 2d 826. It held that, as applied to this case, the

[2] The applicable Georgia statute (Ga. Code Ann. § 38–306 (1954 Rev.)) provides:

"After the facts of conspiracy shall be proved the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

The State introduced extensive additional evidence against appellee (see appellant's Brief, pp. 5–6). Williams did not testify.

Georgia statute violated the right to confrontation secured by the Sixth and Fourteenth Amendments to the Constitution (App. 28–38). The court found that in light of the circumstances in which the statement attributed to Williams was made, it was "inconceivable" that it was uttered "during the pendency of the criminal project" (App. 37) or made in furtherance of the criminal enterprise. (App. 37, note 24.) Finding no rational substitute for the benefits of confrontation in these circumstances (App. 34), the court concluded that application of the Georgia statute had denied confrontation to appellee, and that the admissibility of the evidence could not be considered harmless error. (App. 30, n. 4.)[3]

ARGUMENT

INTRODUCTION AND SUMMARY

Having earlier restored this case for reargument this Term (397 U.S. 1060), the Court on June 29, 1970, invited the Solicitor General to express the views of the United States and to participate in the oral argument (399 U.S. 924). This Brief is submitted in response to that request.

Traditionally, the United States has not participated in the numerous cases in this Court involving the application of the Constitution of the United States

[3] Williams was convicted at a separate trial, at which the statement he allegedly made to Shaw was also introduced against him. His conviction was affirmed by the Georgia Supreme Court. *Williams* v. *State*, 222 Ga. 208, 149 S.E. 2d 499, certiorari denied, 385 U.S. 887. The Fifth Circuit thereafter reversed his conviction, challenged in habeas proceedings, on grounds not relevant to the issue posed here. *Williams* v. *Dutton*, 400 F. 2d 797 (C.A. 5).

to criminal trials in State courts. This has been because ordinarily the outcome of particular State cases is not of direct interest to the federal government and fundamental considerations of federalism militate against executive intrusion into the area of State criminal law. However, the tendency of this Court's decisions in recent years to impose upon the States constitutional restrictions mirroring those applicable in federal prosecutions may in some situations establish a new kind of federal interest in State cases in this Court, arising out of the fact that constitutional law applicable in federal cases may be made in cases coming to this Court from the States. It was such an interest that induced us to participate in *California* v. *Green*, No. 387, last Term (399 U.S. 149), and we assume that similar considerations led to the Court's request in the instant case.

This case involves the court of appeals' consideration, on habeas corpus, of the Georgia Supreme Court's application of a Georgia statute embodying a version of the traditional exception to the hearsay rule permitting one co-conspirator's declarations to be admitted against another. The court of appeals held that the Georgia court's application of the Georgia statute violated the defendant's "sixth and fourteenth amendment right to be confronted by the witnesses against him" (App. 29). The basis for the decision below thus raises a question of direct interest in federal prosecutions for conspiracy and joint-ventures—an interest in the consideration of the constitutional foundations of the co-conspirator doctrine

in general that this case is likely to involve, following as it does the *Green* decision.

Accordingly, we begin with a general discussion of the co-conspirator doctrine. We shall show in Point I that this longstanding doctrine is fundamentally sound under the Sixth Amendment. Its birth was roughly contemporaneous with the Bill of Rights and this Court has repeatedly recognized it. Notwithstanding the difficulty of articulating a rationale, we shall show that the co-conspirator exception, when properly applied, assures the requisites of reliability and evidentiary necessity that can serve, under the Sixth Amendment, as a rational substitute for strict confrontation in the courtroom. With that much established, we think that the facts of this case would be an inadequate vehicle for any attempt to formulate—if that is possible as an abstract matter—comprehensive Sixth Amendment rules for the application of the co-conspirator doctrine to the multifarious types of declarations that might be offered in evidence for different purposes in the complex factual circumstances of particular cases. While the factor of necessity (*i.e.*, the unavailability of an important declarant to testify) may not present serious problems in the normal conspiracy case, the determination of sufficient reliability is likely to be vexatious, as a few examples show. Close questions may arise as to whether a particular declaration is sufficiently related to the establishment, continuance or execution of a conspiracy to warrant its admission against a co-conspirator. It may be even more difficult to determine the interrelated question of the "trustworthiness" of

a particular declaration as tending to prove the proposition for which it is offered; ordinarily a declaration would be offered for what it implies about the nature, scope and activities of a conspiracy, but there are likely also to be cases where a statement of fact is offered to establish the truth of that fact. Neither the past decisions of this and other Courts nor the scholarly literature on this general subject offer ready assistance in the development of comprehensive principles of application, and the facts of this case provide very limited general illumination. Accordingly, we believe that the ramifications can be responsibly explored only as specific cases arise in the future.

In Point II we address ourselves to an equally significant question—the appropriate constitutional approach for determining the validity of State rules of evidence, such as the co-conspirator exception to the hearsay rule which is involved here. We start by noting that if this were a federal case we would conclude that the conviction should be overturned under applicable decisions in the exercise of the Court's supervisory power. Under governing federal law as it now stands, the extra-judicial utterance involved here could not be said to have a tendency to further the conspiracy, the object of which was achieved some fifteen months earlier. See, *e.g.*, *Fiswick* v. *United States,* 329 U.S. 211; *Grunewald* v. *United States,* 353 U.S. 391. But this is not a federal case and the admissibility issue must be resolved in terms of the Confrontation Clause of the Sixth Amendment as applied to the States under the Due Process Clause of the Fourteenth.

Viewing the question in its constitutional setting, it is our submission that the Confrontation Clause should not be read as imposing upon the States an unyielding requirement which would solidify the existing rules, or any particular rules, of hearsay evidence, requiring immutable adherence to them in all their scope and detail. Indeed, in *California* v. *Green*, *supra*, the Court was quite careful to make clear that the Confrontation Clause was not simply a "codification of the rules of hearsay and their exceptions as they existed historically at common law." (399 U.S. at 155). The need to avoid transforming hearsay rules into constitutional doctrine is particularly revealed by analysis of the co-conspirator exception. The rationale of the exception and the proper extent of its application are undergoing reexamination and may require change and adjustment with experience; this would be frustrated by freezing the doctrine—even if there were uniformity in application, which there is not—into a constitutional edict obligatory on the states. In this area of evidence, experimentation is essential to enhance the search for truth within the context of the adversary system, and such experimentation is facilitated if the states are given room for innovation and adjustment.

There is another compelling consideration here. The federal courts—already burdened by a heavy case load of habeas corpus applications seeking to challenge state convictions—should not be called upon

to review the minutiae of State rules of evidence in collateral proceedings. That is not to suggest that a State may constitutionally adopt any evidentiary rule it deems desirable; it is to suggest only that the hearsay rules with all their complexity and detail should not be treated as rules of federal constitutional law. Rather, the Confrontation Clause should be read as imposing on the States only certain basic principles which they are free to apply with some flexibility.

Insofar as the outcome in this case is concerned, it is apparent that the Georgia statute here involved can have numerous proper applications. On the other hand, there are clearly limitations beyond which it could not be applied without running afoul of constitutional prohibitions. There may well be, however, proper bases for finding sufficient reliability to constitute a legitimate substitute for literal confrontation in this case. The declaration had relevance to the case, it was apparently spontaneous, and it was against Williams' interest to make it. Since the State courts did not consider any such alternative grounds for admissibility we believe that they should be afforded that opportunity. We point out that even if this Court were to hold the declaration admissible, thus reversing the court of appeals, that court, on remand, would consider the other unrelated constitutional issues raised by appellee and would be likely to enter a judgment looking toward further state proceedings in this case.

I. THE CO-CONSPIRATOR HEARSAY EXCEPTION IS FUNDAMENTALLY VALID UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

A. THE PRINCIPLES OF THE DOCTRINE ARE CONSISTENT WITH THE CONFRONTATION CLAUSE

Although this Court's decision in *California* v. *Green*, 399 U.S. 149, dealt with a problem distinct from that here—holding that the availability of a declarant for cross-examination at trial made his prior inconsistent statement constitutionally admissible for substantive purposes—the Court's general discussion of the relationship between hearsay and confrontation sets the background for consideration of this case. In *Green*, the Court confirmed that the admission of hearsay—even hearsay that might be inadmissible as a matter of the law of evidence—"does not lead to the automatic conclusion that confrontation rights have been denied" (399 U.S. at 156); it cannot be said that the "Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law" (*id.* at 155). The Court noted, however, that any exception to "the literal right to 'confrontation' and cross-examination" requires "careful scrutiny" (399 U.S. at 162).

There is nothing in *Green* that undermines the continued existence of the rules admitting statements of absent declarants that can pass such "careful scrutiny." *Green* recognizes implicitly—as earlier Sixth Amendment decisions have recognized—that rational substitutes for literal confrontation may be found where the situation requires and proper protections

are provided.[4] We submit that, when applied within proper limits, the co-conspiritor doctrine embodies such a rational substitute. See *Delaney* v. *United States*, 263 U.S. 586, 590, rejecting the contention that the right of confrontation was denied by receipt at a federal trial of extrajudicial statements of a deceased co-conspirator apparently made in furtherance of the conspiracy.

1. History suggests the doctrine's compatibility with the Sixth Amendment confrontation guarantee. This exception to the hearsay rule was developed in a series of English treason trials held virtually contemporaneously with the passage of the Bill of Rights,[5] was soon adopted by a number of the States, and was approved in Mr. Justice Story's 1827 opinion for the Court in *United States* v. *Gooding*, 12 Wheat. 460, 469–470. There is no evidence to suggest that it was considered in any way incompatible with the right secured by the Confrontation Clause or that the Fram-

[4] *E.g.*, a dying declaration, *Mattox* v. *United States*, 146 U.S. 140, 151, or prior testimony where the declarant is unavailable, *Mattox* v. *United States*, 156 U.S. 237, 240–244; see *Barber* v. *Page*, 390 U.S. 719, 722–725; see discussion in our Brief in *Green*, No. 387, O.T., 1969, pp. 7–8, 14–15, 22–23.

[5] See Levie, *Hearsay and Conspiracy*, 52 Mich. L. Rev. 1159, 1162–1163 (1954); see also Note, *Developments in the Law—Criminal conspiracy*, 72 Harv. L. Rev. 920, 922–923 (1959).

The crime of conspiracy itself evolved in the late Thirteenth and early Fourteenth centuries in England and was confined to offenses against the administration of justice. In the Sixteenth and Seventeenth centuries the crime was expanded to approximately its present scope. See Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394–402 (1922).

ers meant to undermine this common law doctrine.[6] Cf. Mr. Justice Harlan's concurring opinion in *California* v. *Green, supra,* 399 U.S. at 174–179.

This Court has frequently recognized the basic validity of this hearsay exception. See, *e.g., Brown* v. *United States,* 150 U.S. 93, 98; *Clune* v. *United States,* 159 U.S. 590, 593; *Delaney* v. *United States,* 263 U.S. 586, 590; *Fiswick* v. *United States,* 329 U.S. 211, 217; *Krulewitch* v. *United States,* 336 U.S. 440, 442–443; *Lutwak* v. *United States,* 344 U.S. 604, 617–618; *Wong Sun* v. *United States,* 371 U.S. 471, 490. While the Court has also indicated the inherent dangers of carrying the co-conspirator doctrine to the limits of its logic (*e.g., Grunewald* v. *United States,* 353 U.S. 391, 404; *Krulewitch, supra,* 336 U.S. at 443–444), it has not focused on the question whether these dangers are of constitutional proportions or more simply subjects for the exercise of its supervisory power over federal evidentiary rules. And even as a non-constitutional matter of evidence law, the scope of the doctrine has not been clearly delineated.

2. Like its boundaries, the constitutional and evidentiary rationales for the co-conspirator doctrine have not been fully and consistently clarified. To the extent that a rationale has been articulated, the exception has usually been justified by a concept of agency or partnership; this Court has used such terms, see,

[6] See this Court's discussion in *California* v. *Green,* 399 U.S. 149, 156–158. We have developed the framework from which the Confrontation Clause and the hearsay rules developed in our Brief in *Green,* pp. 8–15.

e.g., Lutwak v. *United States,* 344 U.S. 604, 617;[7] *Pinkerton* v. *United States,* 328 U.S. 640, 645–648. On one level this suggests an assumption of risk rationale—one who knowingly joins an illegal scheme takes the chance of being charged with statements made by his criminal partners during the course and in furtherance of the scheme. Cf. *Katz* v. *United States,* 389 U.S. 347. On another, and perhaps more significant level, this statement of the rule includes a concept of reliability—given the unitary goal, what one conspirator says in furtherance thereof tends to be a reliable reflection of what a co-conspirator against whom the statement is sought to be admitted would have also said in similar circumstances. Putting the matter in most simple terms: If two or more agree to rob a bank and one stays in the automobile while the other enters the bank and declares that "This is a stickup", it is not only rational to conclude that this statement was authorized by the non-declarant conspirator, or, at least, that he contemplated that it would be made; it is additionally logical to conclude that this statement mirrored what the conspirator assigned to the automobile would have said had it been his assignment to enter the bank. Implicit in such an "agency" or "partnership" justification is its inapplicability to any statement not made in planning

[7] As put in *Lutwak*, *supra* at 617: "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party."

or carrying out the activities of the conspiracy, or to any statement made after the conspiracy ends. *E.g.*, *Fiswick* v. *United States, supra,* 329 U.S. at 217. There can be no reasonable assumption of risk as to a partner's actions outside the scope or term of the partnership, and similarly there is no rational basis for believing that the defendant would have done or said what the other did or said if it was not related to their joint activities.[8]

There is some present movement in federal criminal law to discard agency notions and furtherance concepts on the theory that these formulations do not adequately take into account confrontation considerations, which have only recently come to the fore in this context. In the course of its comments on the proposed Organized Crime Control Act of 1969 (S. 30, 91st Cong., 1st Sess.), the Department of Justice recommended that a provision be added codifying the co-conspirator exception with the following requisites: (1) the declaration was made by the co-conspirator during participation in the conspiracy; (2) there are in existence facts and circumstances from which the

[8] The combination of *res gestae* and agency notions relied upon by Mr. Justice Story in *United States* v. *Gooding*, 12 Wheat. 460, 469–470, similarly point to this concept of reliability.

Professor Wigmore's theory would similarly emphasize reliability and trustworthiness. See 4 Wigmore, *Evidence* (3d ed. 1940) §§ 1077, 1079, 1080. Professor Morgan has rationalized the matter as a vicarious admission. "If B authorizes A to speak for him, he can take no valid exception to the reception of A's statements against him which he could not take to the reception of his own." See Morgan, *Rationale of Vicarious Admissions*, 42 Harv. L. Rev. 461, 463, 464–465 (1929).

trustworthiness of the statement may be inferred; (3) the declaration relates to the existence or execution of the conspiracy; and (4) the declaration was made at a time when the defendant against whom the statement is used participated in the conspiracy. See S. Rept. No. 91-617, 91st Cong., 1st Sess., pp. 113–115. Although this proposal is not included in the bill as passed by the Senate and pending in the House of Representatives, its thrust is significant. The purpose of the proposed substitution of relationship to the conspiracy and trustworthiness for the more traditional furtherance concept was not to eliminate the restriction contemplated by the furtherance requirement but rather to refine it in light of the erratically over-liberal and over-restrictive aplications it has been given in some lower courts. *Ibid.*[9] Such emphasis on reliability,

[9] The same notions are embodied in a statute proposed by one of the consultants to the Commission on the National Commission on Reform of Federal Criminal Laws. (Volume 1 of the Working Papers of the National Commission, p. 386.) This provision, however, was not contained in the Study Draft.

On the other hand, the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1969), would retain the "furtherance" concept, but would reject the agency theory "as a basis for admissibility beyond that already established." See Rule 8–01(c)(3)(v); Comments in the Proposed Draft, p. 169. These proposed rules do not purport to deal with the matter in constitutional terms. See Comments *supra*, pp. 156–159, 169.

The consultant on conspiracy to the National Commission has observed (Vol. 1 of the Working Papers, p. 400, Note B):

"Admissibility may properly rest ultimately on principles analogous to those of agency, yet more ought to be required. Something should be explicitly said about trustworthiness.* * *

"It might well be that this formulation would not, in prac-

whether in a furtherance framework or not, provides, we submit, a rational substitute for strict confrontation that serves the underlying purpose of the Confrontation Clause—that a conviction be based upon the best evidence that the prosecution can produce and that the defense have the opportunity, through the adversary process, to assure that the jury does not rely upon untrustworthy evidence—without unduly hindering the search for truth.

3. There is a further justification for the co-conspirator doctrine that is highly pertinent to confrontation considerations. That is the element of prosecutorial necessity—the unavailability of an essential declarant for examination and cross-examination at trial—an element that has figured importantly in the application of the Confrontation Clause. As we have pointed out, one of the purposes of the Clause is to require the government to produce any available witness, and to discourage it from unnecessary resort to the short-cut of prior testimony or statements. *Barber* v. *Page,* 390 U.S. 719, 725–726; *Motes* v. *United States,* 178 U.S. 458. The converse has also been recognized: the unavailablity of a witness may justify the use of out-of-court statements by him that could not otherwise be used. *California* v. *Green, supra,* 399 U.S. at 165–168, and concurring opinion of Mr. Jus-

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Footnote continued from p. 15.

tice, either expand or contract the present rule. But what it would do is make the search for the just answer surer, since it would explicitly articulate the end to be sought. One who joined a conspiracy would then run the risk of liability for only the circumstantially trustworthy statements of his fellow conspirators, a not unreasonable risk."

tice Harlan at 182–183; *Mattox* v. *United States*, 156 U.S. 237.

Unavailability of the declarant assumes particular significance in the present context when the familiar justification for making conspiracy a crime is taken into account. The generally accepted proposition is that group action toward an antisocial end is inherently more dangerous to society than individual movement toward that same end. Correspondingly, group concert is much more difficult to prove by direct evidence. "Secrecy and concealment are essential features of successful conspiracy." *Blumenthal* v. *United States*, 332 U.S. 539, 557. Accordingly, the law permits conviction of those who know the essentials of the scheme but not all of its details. "Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity." *Ibid.* "[T]he choice may not be between more reliable and less reliable types of evidence, but between admitting inferior evidence or no evidence at all"; [10] or again, as another recent commentator has put it, the true reason for the exception is the "great probative need for such testimony". [11]

Of course, the *ad hoc* "need" of the prosecutor for a conviction cannot justify the use of untrustworthy evidence to secure it. But, given the proposition that

[10] See Note, *Developments-Conspiracy*, *supra*, 72 Harv. L. Rev. at 989.

[11] Levie, *Hearsay and Conspiracy*, *supra*, 52 Mich. L. Rev. at 1166.

the Confrontation Clause does permit unavailability to be taken into account where the government cannot be blamed for it, and given the legitimate need for declarations of co-conspirators in proving crimes involving joint-ventures, a reasonably limited exception to literal confrontation is essential.

B. THE PROBLEMS OF APPLYING THE DOCTRINE, CONSISTENTLY WITH THE CONFRONTATION CLAUSE, TO PARTICULAR FACT SITUATIONS

Although, for the reasons we have given, we believe that the co-conspirator doctrine is consistent with the Sixth Amendment, that is not to say that every out-of-court statement by a defendant's co-conspirator is admissible at his trial for all purposes. It is apparent that the proper application of the doctrine presents problems more difficult than its basic articulation and justification. Neither past judicial decisions nor the scholarly literature, as we have noted, offer a comprehensive framework for developing clear rules of application at this point. Accordingly, we think that refinements must be considered in the light of particular fact situations.

Ordinarily, it should not be a matter of great difficulty to determine whether or not there is a *necessity* for resort to a co-conspirator's statement in a particular trial; we expect, as we have indicated, that most conspiracy cases would present such a necessity, and the prosecution should be required to show no more than that, through no fault of its own, an im-

portant declarant is not available to testify.[12] The more troublesome element in particular cases will be that of reliability, which—as we have suggested (pp. 13, 15–16, *supra*)—itself involves two basic inquiries: whether the declaration is sufficiently related to the conspiracy and whether it is sufficiently "trustworthy" in the context in which it is offered. We have already given the example of a bank-robbery conspiracy where one of the co-conspirators enters a bank and says "This is a stickup". That example presents no serious problem, since the statement was clearly an element in the actual execution of the conspiracy and its utterance was a trustworthy indication that the conspiracy (assuming its existence has been otherwise established) was attempting a robbery. Other situations, however, present more difficult analytical problems.

Whether or not a particular declaration sufficiently relates to the establishment, continuance or execution of a conspiracy depends essentially on the factual context which necessarily varies in each case. If the co-conspirators say in unison "We hereby establish a conspiracy to rob the following banks" there would, of course, be no problem, and indeed the statement may no more be hearsay than the utterance of words of agreement would be in a contract suit. Nor would there be a serious question if one co-conspirator gave another instructions for the robbing of a bank or inquired of a third party where he could obtain tools

[12] If the declarant is on the stand, and willingly testifies to the relevant events (see *Douglas* v. *Alabama*, 380 U.S. 415), the prosecution may constitutionally utilize a prior statement. *California* v. *Green*, *supra*, 399 U.S. at 168.

to carry out the purpose of the conspiracy or sought to recruit a third party to join the scheme.[13] But what of a report by one co-conspirator to another about a robbery just completed, or an argument or boasting among co-conspirators. The possible variants are legion. Equally difficult problems may arise in considering when a statement to a third party, for example a victim or a co-conspirator's wife, may be regarded as reasonably within the scope of a conspiracy.

Even more difficult would be any attempt to lay down comprehensive rules for determining whether a particular declaration is "trustworthy" in a particular context. By "trustworthy" we do not necessarily mean "truthful", because ordinarily a co-conspirator's declaration would not be offered for the direct truth of the underlying factual assertion made in it. More commonly, such a declaration would be used because of what it implies: *i.e.*, the conspirators would not be talking among themselves unless they were actually involved together in the matter under discussion. Such implications would ordinarily be more reliable in a conspiracy situation than would reliance upon a specific statement of fact; moreover, it would in general be unrealistic to say that a person entering a conspiracy thereby vouches for the truth of all factual statements that his co-conspirators may make about their joint activities. On the other hand, it might be shown in appropriate circumstances that a report by one member to another about something he in-

[13] See, *e.g.*, *Baker* v. *California*, pending on petition for a writ of certiorari, No. 5123, this Term, and the opinion of Supreme Court of California appended to the petition.

dividually has done in furtherance of the conspiracy is sufficiently likely to be accurate (because accuracy serves the common enterprise) to permit its admission for the truth of the facts reported. Again, the variables may be extremely complex; whether a particular declaration is trustworthy proof of a particular fact can be determined only in detailed context.

In short, while this case may well provide a starting point for analysis as to the scope and application of the co-conspirator exception, it should not be the vehicle for the announcement of any final principles. In this area of evidentiary law, as in most others, sound doctrine can come only, in Mr. Justice Miller's phrase, "by the gradual process of judicial inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U.S. 97, 104.

II. APPLICATION OF THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT IN STATE CRIMINAL TRIALS

Because this is a case coming here from a State court, it poses more directly than would a federal case the issue of the strictly constitutional limits upon the use of a co-conspirators' statements. We have no doubt that Williams' statement would have been inadmissible under the presently established federal rules of evidence had he been tried in a federal court. The declaration was made fifteen months after the police officer was killed, and there is apparently no basis for saying that the basic conspiracy was still in effect. In *Krulewitch* v. *United States,* 336 U.S. 440, *Lutwak* v. *United States,* 344 U.S. 604, 616, and *Grunewald* v. *United States,* 353 U.S. 391, 399–402, this

Court rejected, as a matter of federal law, the government's argument that a continuing subsidiary agreement to conceal a crime, its perpetrators, and its fruits, may be implied from a conspiracy to commit the crime. And this Court rejected a declaration made under circumstances similar to those here in *Fiswick* v. *United States,* 329 U.S. 211, 217, observing that a "confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." But the cases establishing the specific law that would govern this case in a federal court are not explicitly constitutional decisions, and may well involve to a substantial extent the exercise of this Court's federal supervisory powers which do not, of course, govern the States. Thus, determination of the *constitutional* limits on the States in these circumstances is a more difficult task.

A. GENERAL PRINCIPLES

We start, of course, with the general proposition that the Fourteenth Amendment provides a constitutional right to confrontation in state criminal proceedings. *E.g., Pointer* v. *Texas,* 380 U.S. 400. Last Term's majority opinion in *California* v. *Green, supra,* similarly approached that State case as involving a determination of the scope of "the defendant's right of confrontation guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment" (399 U.S. at 150–151). *Green* went on, however, to suggest that the Confrontation Clause leaves the States a good deal of leeway. The

decision there was that confrontation considerations do not constitutionally bar a State's decision to relax the traditional hearsay rules so as to permit substantive use of a witness' out-of-court statement. A major premise of the decision was that the Constitution should not be read as imposing upon the States an ironclad doctrine which would freeze the existing rules, or any particular rules, of hearsay evidence and require undeviating allegiance to them in all their sweep and detail. The Court, indeed, was quite careful to indicate the contrary: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." (399 U.S. at 155).

The same theme was emphasized in the concurring observation of the Chief Justice that "neither the Constitution as originally drafted, nor any amendments, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States" (*id.* at 171–172). Again, Mr. Justice Harlan in his concurring opinion stressed the changing fortunes of the evidentiary rules of hearsay and the undesirability of limiting "the flexibility of the States and chok[ing] experimentation in this evolving area of the law" (*id.* at 184–185). The thrust of these views, as we understand it, is that there must be some play in the joints when dealing

with matters of such variety and complexity as state rules of evidence.

There are two fundamental considerations that warrant some explanation here as reasons why the States should be as free as the protection of fundamental rights permits from constitutional limitations upon the rules of evidence—and especially hearsay evidence—to be applied in their courts. Both may properly be called principles of a vital federalism. The sound development of the law in this difficult area benefits from relatively unfettered experimentation in the "laboratories" of the States. And the policing burdens that constitutionalization of rules of evidence would give the federal courts might well jeopardize sound judicial administration.

1. The rules of hearsay are constantly in the process of reform and refinement. Bentham [14] was one among many who believed that, in their varying applications, hearsay prohibitions tend to keep relevant evidence from the jury. "Hearsay is competent evidence by the law of many enlightened countries." *Great Northern Railway Co.* v. *Washington*, 300 U.S. 154, 168, 173 (Cardozo, J., dissenting). Judges have long pondered—and differed—as to the appropriateness of these rules of exclusion.[15] See the concurring

[14] See, *e.g.*, Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932 (1962); see also, Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, particularly at 344–346 (1961).

[15] As Professor Wigmore has stated in this regard:

"The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infrajudicially,—this depends on the law of Evidence for the time

opinion of Mr. Justice Harlan, in *Green, supra,* 399 U.S. at 184–185, n. 18. As one recent commentator has observed, "[i]n this area, rules of law must be rules of thumb. All we can ask is that the categories of admissible hearsay be generally reliable; any particular example may be suspect and call for the exercise by a trial judge of his discretion to exclude unreliable evidence." [16]

The stultifying effect of any attempt to weave elaborate evidentiary rules and exceptions into the fabric of the Sixth Amendment is particularly illustrated in the present context of the co-conspirator exception. To begin with, there are wide differences in state practice. The American Law Institute's formulation would abolish the requirement of furtherance; it would instead focus on relevancy and the fact that the statement sought to be admitted was made during the existence of the plan.[17] A somewhat different formulation, but one also focusing upon relevance, is

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being,—but only what mode of procedure shall be followed—*i.e.*, a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 Wigmore, *Evidence*, § 1397, p. 131 (3d ed. 1940).

[16] Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1435, 1437 (1966).

[17] See Rule 508(b), A.L.I. *Model Code of Evidence*, p. 249 (1942), which provides that evidence of a hearsay declaration is deemed admissible if the judge determines that "the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject-matter and was made while the plan was in existence and before its execution was complete * * *." The comments to this provision suggest that all declarations made during the pendency of a conspiracy are "likely to be true, and are usually made with a realization that they are against the declarant's interest" (*Comment*, p. 251). Also statements of a

contained in the *Uniform Rules of Evidence*, Rule 63(9)(b)(1953) contained in 9A Uniform Laws Ann. (1965), p. 636. While neither of these proposals has met with wide acceptance in the state jurisdictions,[14] recommendations for changes are being presented on a variety of fronts. See *e.g.*, S. Rep. No. 91-617, 91st Cong., 1st Sess. pp. 113–115, discussed *supra* pp. 14–15; see also, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (1969) 153–156.

In these circumstances, it would do disservice to the purposes of a vital federalism to solidify any detailed rules in this area into constitutional doctrine obligatory upon the states, and thereby frustrate innovative efforts "to enhance the search for truth in the criminal trial," *Williams* v. *Florida*, 399 U.S. 78, 82; that truth, after all, is the ultimate goal of experimentation and change in criminal rules of evidence. See *People* v. *Spriggs*, 36 Cal. Rptr. 841, 845, 389 P. 2d 377, 381 (Traynor, J.).[15] The court in *Williams* rejected, with similar justifica-

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Footnote continued from p. 25.

co-conspirator after his arrest would be admissible if the execution of the plan had not yet terminated. See *Illustration* 2, p. 254.

[14] See, Note, *Preserving The Right To Confrontation—A New Approach To Hearsay Evidence in Criminal Trials*, 113 U. of Pa. L. Rev. 741, 742 n. 9 (1965); *Note B, Procedural Problems in Conspiracy*, contained in Working Papers of the National Commission on Reform of Federal Criminal Laws, p. 400 (1970); see also, *Handbook of the National Conference of Commissioners on Uniform State Laws* (1969), table opposite p. 192.

[15] It is not inappropriate in this context to recall the words of Mr. Justice Brandeis that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; * * *." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, 311 (dissenting opinion).

tion, any notion that a requirement that a jury have twelve members "has been immutably codified into our Constitution" (399 U.S. at 90); in the absence of any substantial historic foundation for such a rule the Court deemed the relevant inquiry to be "the function that the particular feature performs" and concluded that it was not "an indispensable component of the Sixth Amendment." 399 U.S. at 99–100. Similarly, we suggest, the Confrontation Clause should not be read as making the traditional rules of evidence "indispensable component[s]". To elevate a "rule" to a constitutional mandate is to assume, at the least, the existence of a manageable body of readily identifiable "law" which the "rule" represents. This is at best a fiction in this area. We suggest that Mr. Justice Holmes' warning in *Guy* v. *Donald*, 203 U.S. 399, 406, is applicable here: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds of which the name was applied."

2. Another consideration must be taken into account. It is well known that habeas corpus litigation has increased enormously over the past several years.[29] Undeniably, volume of litigation alone should not be the decisive determinant of whether habeas corpus relief should be granted or not. Federal courts on

[29] In 1968, over 6300 petitions for habeas corpus were filed in the federal courts by state prisoners, an increase of 286 percent in five years. See Annual Report, Director of the Administrative Office of the United States Courts, 130 (1968); see also Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1041 (1970).

occasion must take an independent look at the validity of state resolution of serious constitutional claims. *E.g.*, *Fay* v. *Noia*, 372 U.S. 391; *Townsend* v. *Sain*, 372 U.S. 293. At the same time, however, difficult problems in administration have arisen by virtue of the sheer bulk of such litigation. To insure that the writ provides "a prompt and efficacious remedy for whatever society deems to be intolerable restraints" (*Fay* v. *Noia*, *supra*, 372 U.S. at 401–402;[21] *Harris* v. *Nelson*, 394 U.S. 286, 291), it should not be permitted "to founder in a 'procedural morass.'" *Harris* v. *Nelson*, *supra*, 394 U.S. at 291–292, quoting from *Price* v. *Johnston*, 334 U.S. 266, 269. But such a morass may well result if every litigant who is dissatisfied with state resolution of evidentiary matters may automatically term the alleged violation a "Sixth Amendment Confrontation issue" and obtain collateral relief in the federal courts.[22] Thus both policy and unavoidable practical considerations counsel restraint in federalizing the rules of evidence.

B. SUGGESTED LINES OF ANALYSIS

The foregoing discussion has sought to pinpoint the dangers we perceive in the adoption of any doctrine which woodenly requires a uniform code of hearsay

[21] "[*H*]*abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U.S. 309, 346 (Holmes J. dissenting).

[22] Professor Wigmore devotes over 800 pages of his treatise explaining and discussing exceptions to the hearsay rule. See 5 & 6 Wigmore, *Evidence* (3d ed. 1940).

evidence to be applicable without variation in every State because the Confrontation Clause applies to the States. The thrust of our argument is to suggest that to follow that line of analysis may well undermine sound concepts of federalism and the proper administration of criminal justice in the States. This, of course, is not to say that a state may operate on a clean slate and adopt any rules of evidence it sees fit. Undeniably, there are and must be constitutional limits dictated by the core purpose of the Confrontation Clause to afford an accused a fair trial. We now consider how the Confrontation Clause may be applied so as to preserve these important values.

There are variant ways of articulating the principles by which reasonable State flexibility can be assured consistent with defendants' fundamental federal constitutional rights as this Court has developed them in recent years. One approach—and we commend it to the Court—is to emphasize the role of the supervisory power in formulating evidentiary principles for the federal courts, reserving the Confrontation Clause as a statement of fundamental principles which both the State courts and federal courts (the latter under this Court's special supervision) may apply in ways which meet its basic purpose. Compare *Ker* v. *California*, 374 U.S. 23, 31–33. Especially in light of its sparse language,[*] the Clause need not and should not be read as the foundation for an unyielding code of evidence. It should rather be re-

[*] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

garded as a limited statement of basic constitutional principle that is susceptible of flexible application in particular cases. Nothing in history (see *Green, supra*, 399 U.S. at 156–157) indicates that the "hearsay-evidence rule, with all its subtleties, anomalies and ramifications [should] be read into the Fourteenth Amendment", *Stein* v. *New York*, 346 U.S. 156, 196, or, for that matter, into the Sixth. On the contrary, the subtleties of these rules point in an opposite direction—to fluidity and elasticity of application. "The exceptions are not * * * static, but may be enlarged from time to time if there is no material departure from the reason of the general rule" *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (Cardozo J.). Nor is there any particular function that the present formulation of conspiracy rules of admissibility performs which inexorably requires that it be made an "indispensable component" of the Sixth Amendment made applicable to the states through the Due Process Clause of the Fourteenth. Compare *Williams* v. *Florida, supra*, 399 U.S. at 99–100.

A somewhat different approach has been suggested in Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L.J. 74 (1963). Professor Henkin suggests that the concept of "ordered liberty" be emphasized, not to deny the applicability of the procedural protections of the Bill of Rights to state prosecutions but rather as a reminder that this can be done "without necessarily saddling all the states with what may be peripheral survivals or accretions in the Bill of Rights." *Id.* at 83; see also *id.* at 86–87. Thus, while giving reasonably concrete content to the Due

Process Clause of the Fourteenth Amendment—something that is desirable, *inter alia,* to avoid the excessive federalization of state criminal law that might arise from overzealous use of an amorphous "fairness" concept under the due process rubric—the origin of the constitutional limitations upon the States are emphasized as a reminder that it is not necessary to make those limitations identical in all respects with the limitations expressly stated in the Bill of Rights. In other words, applying the Sixth Amendment to the States need not bind them to all of the detailed subsidiary principles of "confrontation" in the general sense that may develop—or have survived—in the federal cases. Mr. Justice Fortas acutely observed in a related context, that the Fourteenth Amendment did not require the Court "slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. * * * Our Constitution sets up a federal union, not a monolith." *Bloom* v. *Illinois,* 391 U.S. 194, 213–214 (concurring opinion).

Whatever the line of analysis, State courts should be given considerably greater flexibility than the lower federal courts in determining whether or not, in a particular situation, the elements of reliability and necessity that are rational substitutes for strict confrontation are present in sufficient degree. It is one thing to establish that the Constitution requires these factors to be present, but quite another to attempt to establish precise federal measures by which they must

be weighed. The Fourteenth Amendment, applying the Confrontation Clause of the Sixth to the States, requires the states to be cautious [24] in developing substitutes for actual confrontation. This does not mean, however, that this Court—or a lower federal court—should police state practice in the adoption of rules of hearsay evidence. The policies which we have already discussed militate against any excessive federal intrusion.

C. RESOLUTION OF THE ADMISSIBILITY QUESTION IN THIS STATE CASE

As *Amicus* our principal interest has been to state our general views with regard to the nature and application of the co-conspirator exception and the constitutional approach we believe to be appropriate in this State case. Under these views, it is evident that the generally phrased Georgia statute involved (see *supra*, n. 2) can have numerous constitutional applications; it is also undeniable that it would be susceptible of application in circumstances where the Confrontation Clause of the Constitution would not be satisfied. We will now suggest some of the considerations—consistent with our foregoing discussion—that are appropriate to a constitutional evaluation of the precise issue presented.

In justifying the admission of Williams' statement, some 15 months after the crime, implicating

[24] For example, we would have grave difficulty with a statute or judicially created rule of evidence which sought to authorize the admission into evidence in the trial of one conspirator of a confession made *to the police* by another after the conspiracy had terminated. See *e.g.*, *Bruton* v. *United States*, 391 U.S. 123.

Evans, the Supreme Court of Georgia stated (1) that "the conspiracy continued" since the conspirators "were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt", 222 Ga. at 402, 150 S.E. 2d at 248, and that (2) Williams' declaration was accordingly admissible as a co-conspirator's statement made "during the pendency of the criminal project," *ibid.* We do not believe that the Constitution precludes the initial proposition, which is asserted in a substantial body of state law (see *Krulewitch* v. *United States*, 336 U.S. 440, 444), that a subconspiracy to conceal the main conspiracy may be implied and continue after the main conspiracy's functions have been carried out. Although the federal law of evidence is otherwise, see pp. 21–22, *supra*, we believe there is no such constitutional doctrine obligatory on the states, and we perceive no basis for so limiting State development of this aspect of the substantive law of conspiracy. But accepting the State's determination that the conspiracy continued does not end the inquiry. There is a further question, not discussed by the Georgia Supreme Court, of the relationship the par-

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This view rests upon the proposition that such a procedure undercuts the very essence of confrontation protected by the Sixth Amendment. It is illuminating in this regard to note that, in holding *Bruton* retroactive, this Court characterized the *Bruton* defect as going "to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of his guilt or innocence." *Roberts* v. *Russell*, 392 U.S. 293, 294, quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 639 note 20.

ticular declaration bore to the conspiracy even if it continued. Although we would not foreclose a State effort to explain the relationship, we find ourselves unable to see how there was one. As this Court held in *Fiswick* v. *United States,* 329 U.S. 211, 217, a "confession or admission by one co-conspirator after he had been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." Here too, the statement tended to frustrate rather than to serve the purposes of any conspiracy to conceal. In these circumstances, we doubt that the State courts could point to any element of reliability *arising out of the conspiracy* sufficient to constitute a rational substitute for the lack of confrontation.

It might be, however, that the State courts—given the latitude that we believe the Confrontation Clause should allow in such evidentiary matters—could articulate a sufficient basis for considering Williams' statement reliable on grounds other than the co-conspirator doctrine. Few would dispute that the declaration had relevance in the criminal case. The remark was apparently spontaneous and against Williams' own interest.[25] Since the State courts did not

[25] An analogy may be drawn to the "penal interest" exception which is usually bottomed upon the proposition that where one exculpates another by admitting his own guilt, there is sufficient trustworthiness for allowing that statement in for its exculpatory impact. See *e.g.*, 5 Wigmore, *Evidence* (3d ed. 1940) §§ 1476–1477. While this Court long ago held that the "penal interest" doctrine was not a proper exception to the federal hearsay rule, *Donnelly* v. *United States*, 228 U.S. 243, 272–277 (Holmes, J., dissenting), that case was not decided

consider such alternative grounds for admission, we think they should be given an opportunity to do so.[26] In this regard, we note that even if this Court were to hold the declaration admissible, thus reversing the court of appeals' judgment, the court of appeals on remand would presumably consider the substantial unrelated contentions raised by Evans in his habeas corpus petition (see 400 F.2d at 827 n. 3) and would likely enter a judgment looking toward further state proceedings in the case.[27]

CONCLUSION

For the foregoing reasons, we believe that the court of appeals was correct in its conclusion that the co-conspirator doctrine was insufficient constitutional justification for the admission of the utterance in question. However, we believe that the Georgia courts

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upon constitutional grounds. Moreover, the *Donnelly* ruling has been the subject of much criticism. See *e.g.*, Jefferson, *Declarations Against Interest; An Exception to The Hearsay Rule*, 58 Harv. L.Rev. 1, 39–43 (1944): see also *People* v. *Spriggs*, 36 Cal. Rptr. 841, 842–846, 389 P. 2d 377, 378–382 (Traynor, J.).

[26] We express no views on the "harmless error" argument in this case, which, we note, was rejected by the court below (App. 30, n. 4), since it involves no unsettled legal proposition (see *e.g.*, *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250) but merely the application of established rules to a particular set of facts.

[27] In the companion case involving Williams' separate trial, the court of appeals held, *inter alia*, that the State court should reassess the death penalty in accordance with *Witherspoon* v. *Illinois*, 391 U.S. 510. See 400 F. 2d 797, 800, 805. In the present case, the court of appeals did not reach Evans' *Witherspoon* and other constitutional arguments because it disposed of the case on the confrontation ground. It should be pointed out that counsel for the state conceded the applicability of *Witherspoon* at the previous oral argument of this case.

should be given the opportunity to consider alternative grounds for admission, and to that end urges reversal of the judgment below.

Respectfully submitted.

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